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No. 322

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF

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CITATIONS

	Page
Amber v. *Whipple*, 139 Ill. 311	5
Arnold Grocery Co. v. *Shackelford*, 140 Ga. 585	2
Atlantic Coast Line R. R. v. *Burnette*, 239 U. S. 199	6
Bemis v. *Stanley*, 93 Ill. 230	5, 6
Brewster v. *Gage*, 280 U. S. 327	3
Campbell v. *Haverhill*, 155 U. S. 610	11
Central Vermant Ry. v. *White*, 238 U. S. 507	6
Crawford v. *Burke*, 195 U. S. 176	3
Creek Co. v. *Seber*, 318 U. S. 705	3
Davis v. *Willey*, 273 Fed. 397	2
D. Ginsberg & Sons v. *Popkin*, 285 U. S. 204	9
Engel v. *Davenport*, 271 U. S. 33	6
First Presbyterian Church v. *Rabbitt*, 118 F. 2d 732	12
Handtoffski v. *Chicago Traction Co.*, 274 Ill. 282	6
Harrigan v. *Bergdoll*, 270 U. S. 560	2
Horan v. *New Home Sewing Machine Co.*, 289 Ill. App. 340	6
Houston v. *Moore*, 5 Wheat. 1	6
Interstate Railway Co. v. *Massachusetts*, 207 U. S. 79	4
Isaacs v. *Neece*, 75 F. 2d 566	2
Kendall v. *United States*, 12 Pet. 524	4
McDonald v. *Thompson*, 305 U. S. 263	9
Meikel v. *Drain*, 69 F. 2d 290	2
Panama R. R. Co. v. *Johnson*, 264 U. S. 375	4
Pirie v. *Chicago Title and Trust Company*, 182 U. S. 438	3
Schemmel v. *Cooksley*, 256 Ill. 412	5, 6
William Danzer Co. v. *Gulf R. R.*, 268 U. S. 633	6

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REPLY BRIEF

Analyzed, respondent's argument merely discloses the basic weakness of its position. The contentions advanced are not merely ill-founded in reason; they are inconsistent and would nullify an important portion of section 11e of the Bankruptcy Act.

I

Section 11e applies but does not bar suits to set aside preference two years after adjudication.

Respondent's first argument is that under section 11 of the 1898 Act before passage of the Chandler Act, it had been unanimously held—

> that the limitation provisions of section 11 of the Act of 1898 were the sole measure of the time within which actions were required to be brought by the trustee to set aside alleged preferences, and no period of limitation contained either in any state law or in any other federal statute could properly be applied to such a proceeding (Resp. Br. on Merits, p. 11).

Cited in support are *Meikle* v. *Drain*, 69 F. 2d 290 (C. C. A. 9); *Arnold Grocery Co.* v. *Shackelford*, 140 Ga. 585, 79 S. E. 470; see *Davis* v. *Willey*, 273 Fed. 397; *Harrigan* v. *Bergdoll*, 270 U. S. 560.[1]

These decisions were under section 11d of the 1898 Act:

> Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Congress, by section 11e of the Chandler Act, radically changed the law to read:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim * * *.

---

[1] *Harrigan* v. *Bergdoll*, 270 U. S. 560, is obviously not in point. There it was assumed that the state statute applied. As pointed out in *Isaacs* v. *Neece*, 75 F. 2d 566, 568, the question whether state or federal statute of limitations applied was not raised or considered.

Despite this radical and material change in the provision, respondent states as its conclusion under Point I that the cited cases establish two propositions (Resp. Br. on Merits, p. 18):

> The above cases demonstrate that Congress by section 11e of the Chandler Act
>
> [a] codified its concurrence that the limitation provision contained in the bankruptcy act exclusively governed suits by the trustee to set aside voidable preferences, and
>
> [b] provided a period of two years subsequent to the date of adjudication to govern them.

Neither of these propositions advances respondent's argument.

The first is irrelevant [2] because petitioner recognizes that the provisions of section 11e do govern all suits by the trustee, including those to set aside voidable preferences.

The second proposition goes to the question at issue. But there is manifestly no suport in reason for the assertion, "The above cases [i. e., cases decided under section 11d and before enactment of section 11e with its radical change in language] demonstrate that Congress by section 11e of the Chandler Act * * * provided a period of

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[2] Respondent's reasoning by which it reaches this result is plainly untenable. This is an obvious perversion of the rule that re-enactment of a statute after judicial construction thereof will ordinarily be deemed to indicate Congresssional ratification of, and concurrence in, such construction. That rule has no application where, as here, the Congress has repealed the pertinent portions of section 11d (see Section 4 of the Chandler Act, June 22, 1938, c. 575, 52 Stat. 840, 940) and has enacted a new section, 11e, in language entirely different. Where the phraseology of the two enactments is essentially dissimilar, the reason on which the rule is based disappears and the rule itself has no application. Change in language is persuasive that a change in sense was intended. *Creek County* v. *Seber*, 318 U. S. 705, 714; *Brewster* v. *Gage*, 280 U. S. 327, 337; *Crawford* v. *Burke*, 195 U. S. 176, 190; *Pirie* v. *Chicago Title and Trust Company*, 182 U. S. 438, 448.

two years subsequent to the date of adjudication to govern them." Decisions under section 11d antedating enactment of section 11e with its completely different language cannot in reason affect interpretation of the latter.[3] Respondent offers no rule or theory by which to rationalize this obvious *non sequitur*. There is none.

The provision in section 11e that the trustee may institute proceedings in behalf of the estate "within two years subsequent to the date of adjudication *or within such further period of time as the federal or state law may permit*" is a plain adoption by generic reference of the limitation provisions of the state statutes and incorporates as part of section 11e all that is fairly covered by the reference. *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 85; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 391-392. The language of the state statute is given force by the federal law and is just as much a part of the limitation provisions contained in section 11e of the Bankruptcy Act as if physically enacted in terms by the Congress. Cf. *Kendall* v. *United States*, 12 Pet. 524, 625; *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 84-85. The five-year limitation period provided by the Illinois law is thus made an integral part of the second alternative clause of section 11e of the Bankruptcy Act as amended by the Chandler Act. Therefore, even if full effect is given to respondent's proposition (Resp. Br. on Merits, p. 18)—

> that the limitation provision contained in the bankruptcy act exclusively governed suits by the trustee to set aside voidable preferences,

it merely supports petitioner's contention that the five-year period thus provided by section 11e applies.

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[3] See fn. 2.

None of the argument under respondent's Point I can be extended to justify or in any way support nullification of the specific language added by Congress in the alternate clause of section 11e:

> or within such further period of time as the * * * state law may permit.

"Further" is obviously here used in the sense of "additional." Since by definition a statute of limitations fixes the maximum time within which suit must be brought, it is manifest that the limitation provision contained in section 11e allows to the trustee for the commencement of suits to avoid preferences the period of two years or the period permitted by the state law, whichever is longer.

II

No exception in the Illinois Statute of Limitations prevents applicability of the five-year period fixed by Section 15 and by reference incorporated as part of Section 11e of the Bankruptcy Act.

Respondent's heading under Point II of its brief does not reflect the argument there made.

Respondent does not contend that section 15 of the Illinois statute of limitations is *per se*, and by virtue of its language, inapplicable to suits by the trustee to avoid preferences. Respondent admits that section 15 of the Illinois law does apply "if a different limitation period is not prescribed by section 11e" (Resp. Br. on Merits, p. 30).[4]

[4] Unless barred by the law of the jurisdiction where they arose and hence barred by section 20 of the Illinois Limitations Act (Ill. Rev. Stats. (State Bar ed. 1943) c. 83, sec. 21), causes of action arising under the laws of other jurisdictions are governed by the five-year period prescribed by section 15 because "not otherwise provided for" in the Illinois limitation law. *Bem v. Stanley*, 93 Ill. 230, 232 (1879); *Amber v. Whipple*, 139 Ill. 311, 314 (1891); *Schemmel v. Cooksley*, 256 Ill. 412, 413 (1912).

Respondent's argument is based on *Handtoffski* v. *Chicago Traction Co.*, 274 Ill. 282, in which it was held that the exception in section 12 of the Illinois statute of limitations, "except when a different limitation is prescribed by statute," is to read as part of sections 13, 14, and 15 of the statute, and in which, as an example, it was stated *obiter* that the period of limitation fixed by the Employers' Liability Act would prevent application of the limitation prescribed by section 15. We find no fault with the court's holding.[5]

But relying solely on this case, respondent argues: (Br. on Merits, pp. 2, 23):

> The application of that holding by the Illinois Supreme Court to this proceeding is clear. Section 15 of the Illinois Act does not apply because the Chandler Act by section 11e itself *has prescribed a different limitation, namely*, two years subsequent to the date of adjudication.
>
> * * * * * * *

[5] Probably wrong is the *obiter* statement that the exception in section 12 of the Illinois limitation law causes the limitation fixed in the Federal Employers' Liability Act to supersede the state statute of limitation. The result would be the same even in the absence of the exception in section 12 since the limitation contained in the federal act controls because it is a condition of the right. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 511; *Atlantic Coast Line R. R.* v. *Burnette*, 239 U. S. 199, 201; *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633, 637; *Engel* v. *Davenport*, 271 U. S. 33, 38.

Furthermore, the word "statute" as used in the exception in section 12 is properly to be interpreted as referring only to statutes of Illinois. It is elementary that when in statutes a general reference to "law" is made, it can only relate to the "law" of the government making the reference. *Houston* v. *Moore*, 5 Wheat. 1, 42. This is the rule applied by the Illinois courts. In interpreting the Illinois limitation law it has been held that in suits on causes of action arising under laws of other jurisdictions, statutes of such foreign jurisdictions prescribing a longer period of limitation are to be given no effect and the five-year period prescribed by section 15 controls; this despite the exception in section 12. *Bemis* v. *Stanley*, 93 Ill. 230, 232 (1879); *Schemmel* v. *Cooksley*, 256 Ill. 412, 413 (1912); *Horan* v. *New Home Sewing Mach. Co.*, 289 Ill. App. 340.

> The same principle excludes from application to the instant suit the five year limitation provided by section 15 of the Illinois Limitations Act because section 11e of the Chandler Act itself prescribes the limitation period applicable thereto, namely, two years after the date of adjudication in bankruptcy.

Respondent thus ignores the express reference to state law and assumes as a premise that section 11e prescribes a two-year period of limitation for proceedings under section 60b of the Bankruptcy Act. In so doing, the respondent, of course, postulates the very point to be proved. This is the same fallacious reasoning by respondent which is referred to in petitioner's main brief (p. 11).

The same sort of circular reasoning is well-exemplified at a later point in the respondent's brief on the merits. There, however, it does not make the arbitrary choice of the two-year period on the re-reference to section 11e. Instead, it sets up an unbroken circle (Resp. Br. on Merits, p. 30):

> If we first consider section 11e we find it fixes a period of 2 years from the adjudication, except where a state law fixes a longer period. *The question then arises, does section 15 of the Illinois statute apply and fix a five year period? The proper answer is it does, if a different limitation period is not prescribed by section 11e. If we then inquire whether section 11e does fix a different limitation period we find that it does, and that it fixes a 2 year period, unless section 15 applies and fixes a five year period.* (Italics supplied)

The italicized portion constitutes the perfect circle in which respondent becomes involved by ignoring the fact that incorporation of the state law by reference causes section 11e to prescribe a period of limitation exactly the *same* as that prescribed by section 15 of the state law.

Other considerations make plain the fallacy in respondent's argument.

a. Respondent overlooks the fact that section 15, including the exception which is read into it, is incorporated in and made a part of section 11e by virtue of the reference therein to the state law. The result, then, is the same as though section 11e incorporated the two-year provision, the five-year provision of the state law, and the exception in the state law so as to authorize suit "within two years subsequent to the date of adjudication" "or within five years next after the cause of action accrued" "except when a different limitation is prescribed by statute." This makes apparent the absurdity of arguing that the exception in the last-quoted clause refers to the first clause so as to bar operation of the second clause.

b. If valid, respondent's argument under Point II amounts to saying that the state by the form of its legislation can prevent the Congress from adopting a state-prescribed period of limitation even in the field of bankruptcy where the federal power is paramount. Thus, under respondent's contention, even if section 15 of the Illinois statute in terms specifically included "suits under section 60b of the Bankruptcy Act," nevertheless the result would be the same as that for which respondent argues here: The trustee would be barred from suit two years after adjudication because of the exception in section 12 of the Illinois law and respondent's arbitrary selection of the two-year provision in section 11e to make the latter fall within the exception.

c. Respondent's argument is inconsistent within itself and, at least so far as suits in the Illinois courts, federal or state, are concerned, would entirely nullify the clause of section 11e referring to state laws.

Respondent has taken the position that if the trustee sues on a cause of action arising under state law, then the

reference in section 11e to state law does operate and the state law of limitations does apply (Br. in Opp., pp., 7-8; Br. on Merits, p. 18). But this interpretation cannot be reconciled with respondent's contention under Point II that the two-year clause of section 11e is a "different limitation" prescribed by statute within the meaning of the exception read into section 15 from section 12 of the Illinois act. If, as respondent contends, in the case of actions arising under the Bankruptcy Act the reference in section 11e to state law is to be ignored and the two-year provision is to be regarded as within the exception in section 15, thus preventing application of section 15, then the same result must obtain with respect to suits by the trustee on causes of action not arising under the Bankruptcy Act. No basis for differentiation has been suggested. Thus, the reference in section 11e to "such further period of time as the * * * state law may permit" would be completely nullified. But so to do would contravene the rule that a statute is to be interpreted, if possible, so as to give force and effect to all its parts. *D. Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *McDonald* v. *Thompson*, 305 U. S. 263, 266.

Respondent's Point II lends no weight to its argument because it assumes as a premise the very point to be established.

III

Respondent's Point III, if valid, makes the five-year limitation of the State Statute applicable and requires reversal of the decision below.

Respondent caps its tenuous argument as to construction with the contention (Resp. Br. on Merits, p. 24):

> The words "Federal or State law" as used in the next to the last line in the above quotation from section 11e clearly refer to claims against which the period of limitation fixed by such Federal or State law *could*

> have expired prior to the filing of the petition in bankruptcy. (Italics supplied).

Respondent repeats this argument (Resp. Br. on Merits, p. 27):

> The entire adjective clause—"against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy"—immediately following the words "any claim" obviously qualifies that term and *makes manifest the fact that Congress had in mind "claims" arising prior to the institution of the bankruptcy proceeding*, since it could only be with respect to claims of such a character that the period of limitation fixed by Federal or State law had expired partially at the time of the filing of the petition in bankruptcy. (Italics supplied).

The argument thus resolves into a contention that the prepositional phrase "upon any claim" refers only to claims against which the period of limitation could have expired prior to the filing of the petition. But if this be so, then no part of section 11e relates to suits by a trustee "upon any claim" arising out of the bankruptcy. For it is obvious that the phrase "upon any claim" modifies and limits the predicate of the whole sentence and, if it is limited as respondent contends, then the scope of the whole sentence in question is narrowed to include only proceedings by the trustee upon claims against which the period of limitation fixed by state law *could* have expired prior to the date of the petition in bankruptcy.

Because the right to avoid preferences is not a claim arising prior to the filing of the petition in bankruptcy and is not a claim against which the period of limitation fixed by federal or state law *could* have expired at the time of the filing of the petition, the consequence of respondent's argument, if it be accepted, is to interpret section 11e as

having utterly no bearing upon suits to set aside preferences. No other period of limitation established by the bankruptcy law or the Federal law is suggested as applicable. It would necessarily follow that under the Rules of Decision statute, the limitations provided in section 15 of the Illinois law would apply. *Campbell* v. *Haverhill*, 155 U. S. 610, 614-616, and other cases cited in petitioner's main brief (p. 26). Respondent's Point III, therefore, if sustained,[6] would require reversal of the decision he seeks to support.

Conclusion

Aside from the obviously fallacious reasoning of the court below and of the respondent here, certain other considerations which make against the result reached by the Seventh Circuit should not be overlooked.

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[6] The conclusion stated in the first sentence on page 25 is obviously fallacious. It is axiomatic that the only claim against which the period of limitation fixed by state law could have expired at the time of the filing of the petition in bankruptcy is a claim which pre-existed the filing of the petition. But from this it does not follow, as respondent asserts, that such claims are the only claims to which the period of limitation fixed by state law could have application. And certainly neither proposition supports the conclusion (stated by the respondent as a premise, p. 25): "Since the meaning of the phrase 'federal or state law' * * * is limited to the law applicable to causes of action which could pre-exist the date of the filing of the petition in bankruptcy * * *." While this at first blush may appear to be a restatement of the prior proposition, examination shows that it is a complete *non sequitur*.

Finally, even if "federal or state law" be limited in meaning, as respondent contends, to state law applicable to causes of action which could pre-exist the date of the filing of the petition, respondent's argument is not advanced. For obviously part of the state law applicable to causes of action which could pre-exist the date of the filing of the petition would be section 15. It results that the narrowing of the meaning of the phrase "federal or state law" for which respondent contends could in no way affect the result here. This shows that respondent seeks not to limit the meaning of this phrase but rather to narrow the meaning of the words "any claim" and so narrow the scope of the statute. Indeed, this true aspect of respondent's argument under Point III is confirmed in the argument on page 27 of its brief.

If respondent's position is correct, then it might well be argued as a corollary thereto that causes of action arising in favor of the trustee during the process of bankruptcy administration would become barred upon the expiration of two years from the date of adjudication since they did not pre-exist the filing of the petition. In some cases this might allow only a relatively few months or even weeks within which to bring suit.

The contention of respondent would also seem to carry with it the implication that in suits to avoid preferences the trustee would be deprived of the benefit of section 22 of the Illinois statute of limitations (Ill. Rev. Stats. (State Bar ed. 1943) c. 83, sec. 23):

> If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the suit discovers that he has such cause of action, and not afterwards.

The law of most other states, decisional or statutory, includes similar provisions. Respondent's interpretation would thus deprive the trustee and other creditors of the benefit of such provisions in suits under section 11e and under section 67d while at the same time continuing their protection against concealment in proceedings under section 70e with respect to causes of action under state law. (Cf. *First Presbyterian Church* v. *Rabbitt*, 118 F. 2d 732, 735.) Such a result is clearly to be avoided if possible. It would indeed be anomalous for Congress to bar suits on causes of action created by the Act and by Congress deemed essential to its operation while at the same time permitting to the trustee a longer period of limitation on causes of action arising under state law.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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APPENDIX.

Section 11e of the Bankruptcy Act as added by the Chandler Act, June 22, 1938, c. 575, sec. 1, 52 Stat. 840, 849 (11 U. S. C. sec. 29e) provides:

> "e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement, or in the proceeding or by applicable Federal or State law, as the case may be."